92-916

No. _____

Supreme Court, U.S.
FILED
FEB 19 1993
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF NEBRASKA,

Petitioner,

v.

LANNY K. HICKS,

Respondent.

Brief In Opposition To Petition
For A Writ Of Certiorari
To The Nebraska Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THOMAS M. KENNEY, #15255
Douglas County Public Defender
KELLY S. BREEN
Assistant Public Defender
306 Hall of Justice
Omaha, NE 68183
(401) 444-7175

Counsel for Respondent

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STATEMENT OF THE CASE

Respondent accepts the Statement of Facts contained in the State of Nebraska's Petition herein. See Petitioner's Petition for Writ of Certiorari at 2-5. Respondent believes that procedural default on the part of the State of Nebraska is relevant to this Court's disposition of the Writ, and submits the following additional facts.

The judgment of the Nebraska Supreme Court was entered August 28, 1992, whereby the Court reversed Respondent's conviction and remanded the case to District Court for a new trial. On September 3, 1992, Petitioner filed a Motion for extension of time to file a Motion for New Hearing. Thereafter, on September 17, 1992, Petitioner filed a Motion for Rehearing. The Nebraska Supreme Court overruled the Motion for extension of time and dismissed the Motion for Rehearing as untimely on September 25, 1992. Copies of these Orders are attached in the Appendix hereto at A-1, A-2. Mandate of the Nebraska Supreme Court on the case herein was issued on September 29, 1992 and filed in the District Court of Douglas County, Nebraska on October 2, 1992. At no time has the State of Nebaska sought a stay of the Nebraska Supreme Court's mandate in the case herein.

REASONS FOR DENYING THE WRIT

No actual case or controversy would be presented to this Court if the Writ were granted, since the State has failed to stay the Nebraska Supreme Court mandate herein. In addition, an adequate State constitutional ground supports the decision of the Nebraska Supreme Court. Procedural default and deference to the

Nebraska Supreme Court's opinion on the protections of liberty contained in the Nebraska State Constitution suggest that this Court should deny the Petition for Writ in the exercise of sound discretion.

I.

THE UNITED STATES SUPREME COURT DOES NOT ISSUE ADVISORY OPINIONS AND THE COURT SHOULD ONLY ACCEPT FOR HEARING ACTUAL CASES IN CONTROVERSY

The State of Nebraska has not sought a stay of the enforcement of the judgment of the Nebraska Supreme Court herein. Nebraska Supreme Court Rule 14 provides in subsection (2):

> Parties desiring to prosecute proceedings to the Supreme Court of the United States, and desiring an order staying the mandate, must make application within seven days from the date of the filing of the opinion or other dispositive entry. The application must be accompanied by a written showing when a federal question is involved. If a motion for rehearing is filed, the application of showing shall be filed with the motion. If the application is granted, the court may require the giving of a bond as a condition therefor.

The State of Nebraska filed an untimely Motion for Rehearing with the Nebraska Supreme Court and no application for stay of the mandate was submitted. The Motion for Rehearing was denied on September 25, 1992. A copy of the Nebraska Supreme Court mandate issued on September 29, 1992 is attached in the Appendix hereto at A-3, A-4. On October 2, 1992, the Douglas County District Court received the mandate of the Nebraska Supreme Court in the case of State of Nebraska v. Lanny K. Hicks. Pursuant to that mandate,

Respondent Hicks must be brought to trial in Douglas County District Court within six months from the return of the mandate. See Neb. Rev. Stat. §29-1207(1) and (3) (Reissue 1989). Neb. Rev. Stat. §29-1207 provides in pertinent part:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months . . . .
>
> (3) If such defendant is to tried again following a mistrial, an order for new trial, or an appeal or collateral attack, such period shall commence to run from the date of . . . the mandate on remand.

Neb. Rev. Stat. §29-1207(1) and (3) (Reissue 1989).

Certiorari would be improvidently granted in this case since this Court's opinion on the merits cannot be expected before the new trial ordered by the Nebraska Supreme Court. See Herb v. Pitcarirn, 324 U.S. 117, 125-26 (1945) ("[w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

Respondent would resist any attempt by the State of Nebraska to seek a stay from this Court. See United States Supreme Court Rule 23.3 ("[e]xcept in the most extraordinary circumstance, an application for stay will not be entertained unless the relief requested had been sought in the appropriate court or courts below or from a judge or judges thereof.").

II.

THE DECISION OF THE NEBRASKA SUPREME COURT HEREIN IS SUPPORTED BY AN INDEPENDENT STATE CONSTITUTIONAL CONSIDERATION

In its opinion below, the Nebraska Supreme Court found the stop and seizure of Respondent unlawful under the Fourth Amendment and the Nebraska Constitution Art. I, Section 7. See State v. Hicks, 241 Neb. 357, ___, 488 N.W.2d 359, 363 (1992). Nebraska Constitution Art. I, Section 7 provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

While it is apparent that the Nebraska Supreme Court has followed instructions from federal courts in regard to the parameters of the Fourth Amendment, nothing in the opinion below or any other opinion of the Nebraska Supreme Court intimates or suggests that the State Court has abandoned the Nebraska Constitution in exclusive favor of the Fourth Amendment in its analysis of Nebraska's citizens protection from unreasonable search and seizure. See e.g., State v. Skolnik, 218 Neb. 667, 358 N.W.2d 497 (1984) (In case of warrantless seizure of purportedly obscene films, Nebraska Supreme Court addresses the State constitutional protection of free speech and free expression found in Nebraska Constitution Art. I, Section 5 and its impact on the determination

of reasonableness of search and seizure under the provisions of Art. I, Section 7).

It would be improvident for this Court to exercise discretionary jurisdiction when an independent state constitutional ground supports the decision of Nebraska's highest court. See Fay v. Noia, 372 U.S. 391, 432 (1963) (Supreme Court should defer to state courts in determination of substantive rights under state law so long as they are not patently evasive of or discriminatory against federal rights). The Petitioner maintains that it is important for the Court to resolve a conflict among jurisdictions regarding whether flight alone can constitute the basis for a Terry stop and detention, since the issue involves a determination of Fourth Amendment rights. Yet, the significant number of jurisdictions which have rejected the Petitioner's theory suggests that these jurisdictions do and will analyze the issue in light of state constutitional provisions that protect citizens from unreasonable search and seizures. See e.g., People v. Shibaz, 424 Mich. 42, 378 N.W.2d 451 (1985); People v. Aldridge, 35 Cal.3d 473, 674 P.2d 40, 198 Cal. Rptr. 538 (1984); People v. Thomas, 660 P.2d 1272 (Colo. 1983); Watkins v. State, 288 Md. 597, 420 A.2d 270 (1980); Dimascio v. Municipality of Anchorage, 813 P.2d 696 (Alaska App. 1991); Commonwealth v. Martinez, 403 Pa. Super. 125, 588 A.2d 513 (1991); People v. Raybourn, 266 Cal. Rptr. 884, 218 C.A.3d 308 (Cal. App. 4 Dist. 1990); Dames v. State, 566 So.2d 51 (Fla. App. 1 Dist. 1990); State v. Talbot, 792 P.2d 489 (Utah App. 1990). Many of these decisions came after this Court's opinions in the cases of

Michigan v. Chesternut, 486 U.S. 567 (1988) and California v. Hodari D. ___ U.S. ___, 111 S.Ct. 1547, ___ L.Ed.2d ___ (1991). The dicta in Chesternut, supra, and Hodari D, supra, was brought to the attention of the Nebraska Supreme Court in oral argument below. Nevertheless, the Nebraska Supreme Court held that the stop of Respondent was unlawful in light of both federal and state constitutional protections against unreasonable search and seizure. State v. Hicks, 488 N.W.2d at 363.

The Petitioner maintains that there is "a balance to be struck between society's interests in effective crime prevention and detection and a citizen's right to be free from unwarranted harassment from the police." See Petitioner's Petition for Writ for Certiorari at 13. The Petitioner is clearly in error. No matter how much "society" would benefit, the Nebraska Constitution does not permit the unwarranted harassment of citizens by unreasonable search and seizure. See Neb. Con. Art. I, Section 7. This Court should deny the Petition for Writ of a discretionary review, since the decision of the Nebraska Supreme Court herein is supported by an independent state constitutional ground.

CONCLUSION

The Respondent is entitled to an absolute discharge of the information filed against him if he is not brought to trial within six months of the mandate returned by the Nebraska Supreme Court. See Neb. Rev. Stat. §29-1207(1) and (3) (Reissue 1989). In all likelihood, this Court would not be presented with an actual case or controversy if the Petition for Writ of Certiorari is granted.

In addition, there is an adequate state constitutional ground which supports the decision of the Nebraska Supreme Court herein. For these reasons, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

THOMAS M. KENNEY

Douglas County Public Defender

KELLY S. BREEN

Assistant Public Defender

APPENDIX

SUPREME COURT OF NEBRASKA
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

September 25, 1992

Patrick J. Boylan
DOUGLAS COUNTY PUBLIC DEFENDER OFFICE
306 Hall of Justice
1701 Farnam
Omaha, NE 68183

IN CASE OF: S-91-0660, State v. Lanny K. Hicks

Appellee/Motion for Rehearing & Brf **filed** 09/17/92

has been reviewed by the court and the following order entered:

Motion of appellee for rehearing dismissed as untimely; mandate to issue forthwith.

Respectfully,

CLERK OF THE SUPREME COURT

SUPREME COURT OF NEBRASKA
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

September 25, 1992

Patrick J. Boylan
DOUGLAS COUNTY PUBLIC DEFENDER OFFICE
306 Hall of Justice
1701 Farnam
Omaha, NE 68183

IN CASE OF: S-91-0660, State v. Lanny K. Hicks

Appe Mot Ext Time File Mot Rehear & Brf **filed** 09/03/92

has been reviewed by the court and the following order entered:

Overruled.

Respectfully,

CLERK OF THE SUPREME COURT

Date: September 29, 1992

NEBRASKA SUPREME COURT

To: Douglas County District Court, Nebraska

WHEREAS, in a late action in your court, captioned:

State v. Lanny K. Hicks

you rendered judgment.

And, WHEREAS, the defendant, Lanny K. Hicks prosecuted an appeal to this court.

ON CONSIDERATION WHEREOF, the judgment which you rendered has been reversed and remanded for a new trial

by the Supreme Court.

NOW, THEREFORE, you shall, without delay, proceed to enter judgment in conformity with the judgment and opinion of this court.

Costs of this appeal are to be paid by Douglas County and are taxed at $50.00.

WITNESS the Honorable William C. Hastings, Chief Justice, and the seal of this court.

Lanet S. Asmussen
Clerk of the Supreme Court

Deputy Clerk

Supreme Court No.	COSTS IN THE SUPREME COURT	
S-91-0660	Cost Due Clerk Supreme Court	$50.00
Trial Tribunal No.	Paid by District Court Clerk	$-0-
127-799	Total Costs	$50.00
Date Opinion Issued		
08/28/92		

Costs should be distributed in accordance with Neb. Rev. Stat. § 25-1915 (Reissue 1985).

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
OCT -2 1992
RUDY J. TESAR
CLERK DISTRICT COURT

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IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

OCT -2 1992

RUDY J. TESAR
CLERK DISTRICT COURT

Ent. Ap. Doc. M
Ent. Ex. Doc.
Ent. Gen. Index 3061 P.138

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